Supreme Court, U.S.
FILED
MAR 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1188

In the Supreme Court of the United States

OCTOBER TERM, 1986

S. FRANKLIN BURFORD, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner contends that the Tax Court lacked jurisdiction to redetermine that portion of his tax liability attributable to an increased deficiency asserted in an amendment to the Commissioner's answer.

1. On his income tax return for 1976, petitioner reported capital gain of approximately $4 million. In computing his tax on that gain, petitioner claimed a deduction, pursuant to Section 1202 of the Internal Revenue Code,[1] equal to 50% of his capital gain, or $2,062,853. Because that deduction constituted an "item of tax preference," petitioner became liable for the "minimum tax" imposed by 26 U.S.C. (1976 ed.) 56. Pet. App. 11a.[2]

[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.).

[2] Section 56, as in effect for the 1976 taxable year, provided that "[i]n addition to the other taxes imposed by this chapter, there is hereby imposed for each taxable year, with respect to the income of every person, a tax" measured by items of tax preference. This "minimum tax" was equal to 15% of the excess of the amount of tax

Petitioner computed his minimum tax liability, in the amount of $270,290, on IRS Form 4625. He attached that Form to his return, and he reported that liability on line 56 of his return. Pet. App. 11a. Petitioner did not, however, include this minimum tax liability in his computation of the total tax liability that was due to be paid with his return. The Commissioner treated this omission as a clerical or mathematical error and made an assessment against petitioner, pursuant to Section 6213(b)(1) of the Code, in the amount of the minimum tax due. Pet. App. 11a.[3]

Subsequently, the Commissioner examined petitioner's return and determined that his income tax liability for 1976 also was understated for reasons apart from the minimum tax. Accordingly, he issued a notice of deficiency for that year. The amount of the deficiency asserted in that notice did not include the amount of minimum tax liability shown on the return because, as explained above, that amount had previously been assessed under Section 6213(b)(1). The notice of deficiency did *refer* to minimum tax liability in the calculation of the petitioner's total tax liability. However, the minimum-tax amount shown on the return was then subtracted as an "amount[] previously assessed" (I.R.C. § 6211(a)(1)(B)) in computing the amount of the deficiency. See C.A. App. 26.

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preference items over the greater of $10,000 or one-half of the taxpayer's regular income tax liability (with certain adjustments). Included among the specified items of tax preference was the deduction for capital gain provided in Section 1202 of the Code. See 26 U.S.C. (1976 ed.) 57(a)(9)(A).

[3] Section 6213(b)(1) authorizes an assessment on the basis of what would have been the correct amount of tax but for a mathematical or clerical error appearing on the return. The notice informing the taxpayer of such an assessment is not considered a statutory notice of deficiency, and "the taxpayer shall have no right to file a petition with the Tax Court based on such notice." *Ibid.*

Petitioner filed a petition in the United States Tax Court, seeking a redetermination of the deficiency and a determination that he had overpaid his income tax for 1976. The petition did not contain any assignment of error with respect to that portion of the deficiency notice that showed the minimum-tax amount as a component of petitioner's total liability. Nor did petitioner allege any facts with respect to the determination of the minimum tax. Pet. App. 11a-12a.

While this case was pending in the Tax Court, petitioner brought an action in the United States District Court for the Southern District of West Virginia. He contended, inter alia, that his failure to include the minimum-tax amount on his 1976 tax return was not a mere "mathematical or clerical error," and hence that the Commissioner had improperly assessed that amount under Section 6213(b)(1). See Pet. App. 12a-13a. Petitioner sought an injunction against collection of the assessment, and the district court granted a preliminary injunction to that effect. The Commissioner thereupon abated the Section 6213(b)(1) assessment and refunded to petitioner the amounts that had been collected pursuant thereto. Pet. App. 12a-13a, 15a.[4]

As a result of the abatement of the Section 6213(b)(1) assessment, the Commissioner sought and obtained permission from the Tax Court to file an amendment to his answer. That amendment sought an increased deficiency in tax, over and above the amount set forth in the notice of deficiency, in order to reflect the amount of the assessment that had been abated. Petitioner objected on the ground that the Tax Court lacked jurisdiction to redeter-

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[4] The district court eventually dismissed petitioner's complaint upon his failure to respond to an order directing him to submit a statement indicating whether he desired to prosecute his claims. Pet. App. 23a n.1.

mine such an increased deficiency. Petitioner also claimed that the minimum tax, the source of the increased deficiency, was unconstitutional. The Tax Court rejected both contentions and found that petitioner was liable for the asserted deficiency, including the minimum tax owed (Pet. App. 16a-19a). The court of appeals unanimously affirmed in a per curiam decision (*id.* at 22a-25a).

2. There is no merit to petitioner's contention that the Tax Court lacked jurisdiction to determine a deficiency in an amount that included his unpaid minimum tax liability. Petitioner does not allege (nor is there) a conflict among the circuits on any question presented here. There is no basis for further review.

At the outset, we note that petitioner does not dispute that he is liable for the full amount of the minimum tax asserted by the Commissioner. Petitioner's jurisdictional contention is a transparent effort to avoid paying this clear liability. When the Commissioner treated petitioner's omission from his 1976 return of the computed minimum tax liability as a clerical mistake, and accordingly made an immediate assessment under Section 6213(b)(1), petitioner sought in district court to enjoin collection on the ground that the assessment was invalid. When the Commissioner accepted petitioner's contention and abated that assessment, petitioner then sought to defeat the Tax Court's jurisdiction over the issue by asserting in that court that the assessment was valid and that the Commissioner's abatement of it should be voided as exceeding his authority. The courts below correctly rejected petitioner's ploy; the Tax Court plainly had jurisdiction to determine a deficiency in an amount that included petitioner's unpaid minimum tax liability.

Once a taxpayer has filed a petition with the Tax Court, the Tax Court acquires jurisdiction to determine the correct amount of the person's tax for that year. Section 6214(a) explicitly provides that "the Tax Court shall have

jurisdiction to redetermine the correct amount of the deficiency *even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer,* and to determine whether any additional amount, or addition to the tax should be assessed, if claim therefor is asserted by the Secretary at or before the hearing or a rehearing" (emphasis added). Thus, the statute could not be clearer that the non-inclusion of the minimum tax liability in the amount of the deficiency reflected on the original notice sent to petitioner poses no jurisdictional bar to the Tax Court's inclusion of the minimum tax in determining "the correct amount of the deficiency." See, *e.g., Ferrill* v. *Commissioner*, 684 F.2d 261, 265 (3d Cir. 1982); *Henningsen* v. *Commissioner*, 243 F.2d 954, 959 (4th Cir. 1957). The Commissioner here—by way of an amended answer—timely asserted a claim for an increased deficiency to reflect petitioner's minimum tax liability, and accordingly the Tax Court had jurisdiction to consider this claim under Section 6214(a). See Pet. App. 16a-18a.

Petitioner's contention (Pet. 6-7) that the Tax Court's jurisdiction over the minimum-tax issue is barred by Section 6211 of the Code is frivolous. Section 6211(a)(1)(B) states that, in computing the amount of a "deficiency" in tax, "the amounts previously assessed" must be subtracted from the total tax liability as determined by the Commissioner. This simply reflects the obvious fact that, to avoid double-counting, amounts that are already subject to collection because they have been assessed are not part of the "deficiency." Section 6211 does not remotely suggest that such amounts may not be made part of a Tax Court proceeding if the assessment is abated. To the contrary, the statute says that the "deficiency" subject to redetermination by the Tax Court shall be increased by "the amount of rebates," which are defined to include "abatements" and

"refunds." I.R.C. § 6211(a)(2) and (b)(2). The cases cited by petitioner (Pet. 7) in no way support his remarkable assertion to the contrary.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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[5] Petitioner's assertion (Pet. 8-10) that the Commissioner exceeded his authority in abating the assessment of minimum tax liability is also frivolous. Section 6404(a) generally authorizes the Commissioner to make abatements, and Section 6213(b)(2) specifically authorizes the Commissioner to abate assessments of clerical or mathematical errors. In any event, petitioner can scarcely complain that the Commissioner, in response to petitioner's own assertion that the assessment was invalid, abated the assessment and refunded the tax to him.

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/40267